November 26, 1897, and began actual dredging in the following March. It was bound to finish by February 25, 1899. In January, 1899, it asked for an extension of time on account of storms, accidents, unforeseen hardness of material and other difficulties. On February 15 the time was extended by the Secretary of the Navy to December 30, 1899. But in about two months the contractor stopped work and asked leave to dump in deep water instead of on shore. This was refused. There were another application and refusal and further correspondence, and finally leave was granted on February 21, 1900. The contractor, however, did no more work after April, 1899. On May 25, 1901, the Navy Department declared the contract void, and a new contract was made, after advertisement in the required way, by which a third party was employed to complete the work at the lowest rate that the Government could get by such a bid. The damages allowed in the Circuit Court were the difference in cost between the old contract and the new; viz. $25,588.02 with interest, or $33,389.52 in all.

The defence is rested mainly on the extension of time, it not appearing that the sureties assented to the change otherwise than by the contract, which, it is said, merely recognizes what was true without it, that the contractor might ask for more time and the Government grant it if so minded. It is argued that the expression of the obvious does not alter the general rule of law. But the question is not what was possible but what was contemplated as not improbable, and we are of opinion that the sureties were not discharged. There is no sacrosanct prohibition of change as against them; the law has no objection to it if they assent. Whether they have done so or not is simply a question of construction and good sense, taking words and circumstances into account. If we should assume in their favor that in this case there could be no change without mutual agreement, still in our opinion this contract so

definitely contemplated what the nature of the work made manifest, that it might be necessary or very convenient to extend the time; that the sureties must be taken to have contemplated it also as permissible against themselves. In *United States* v. *Freel*, 186 U. S. 309, 317, it was recognized that a clause similar to the one to which we have referred concerning the case of the United States deeming changes desirable would authorize some changes of plan without discharging the sureties. It is true that that contract contained a proviso that no change of the kind should affect the validity of the contract, which of course it would not in any event if the contractor agreed to it. But the sureties, so far as appears, signed the bond only and were sued upon that. The proviso did not affect their case. See also *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 424.

It is urged that the last mentioned section dealing with changes deemed desirable by the Government requires that they, as well as the increased or diminished compensation, must be agreed to in writing by the parties to the contract before they are begun; and it is suggested that this requires the consent of the sureties. We do not read it so. We think that so far as this clause goes it contemplates an imperative right on the part of the Government to make a change, but requires a writing as a condition of going on. See Rev. Stat., § 3744. The same notion is repeated in the specifications with even more definite assumption that the Government may make changes if its sees fit. "Should it be to the interest of the Government to make any changes in the plans . . . the . . . compensation is to be determined" &c. So again the Government reserves an unqualified right to change the limits of the dredging and the points of deposit. Moreover, comparing the clause with the specifications, which more or less repeat the provisions, as we have said, and deal with the contractor *eo nomine*, we should be inclined to construe

the word parties as meaning the contractor and the United States. But we do not delay upon this, as the case must be decided on the provisions dealing expressly with extension of time, and we have referred to the other clauses simply to show that in other particulars, as well as time, the sureties were going into an undertaking which was subject to contingencies of several sorts. It was limited by the appropriations available. It might be modified in plan. The limits of dredging might be changed. Necessity or convenience might require an extension of time.

We should be inclined to suppose that the extension was allowed as an unavoidable delay. But if it was allowed as an avoidable one, it does not appear that the Government did not enforce the condition as to the costs to be borne by the contractor, and if it took no steps to collect them the sureties were not concerned. The contract was not altered, and insistance by the United States would have done them no good.

The construction that we adopt is fortified by the provision for deductions of $50 per day for delay beyond the period fixed for the end of the work. For even though this fell only on the contractor it created a necessity for extension in possible cases, to which the sureties must be deemed to have assented rather than expose their principal to such a risk. Manifestly if the construction now contended for by them had been written in it would have created a strong motive against relaxations that would have let them off. We deem what we had said sufficient to justify our conclusions without considering the argument of the Solicitor General that the contractor was given a right to the extension of time if the Secretary of the Navy decided for it, and that the Secretary of the Navy is to be regarded as a third party and stranger to the contract rather than as representing the United States. See *United States* v. *Gleason*, 175 U. S. 588. Of course if the Secre-

tary be so regarded the contractor's right is made out, as the extension would be independent of the will of the other party to the contract, the United States.

The next argument that seems to us to need a word is on the effect of the election of the United States to annul the contract, as it was said. The infelicity of the word annul has been adverted to and its meaning explained heretofore. If notice had been given before the final breach and abandonment, it would have meant simply that the United States would proceed no further with the contractor under the contract, not that it rescinded or avoided it. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard*, 13 How. 307, 340. *United States* v. *O'Brien*, 220 U. S. 321, 328. At the time when the notice was given it was merely a ceremony to mark the point of default as a preliminary to employing some one else. The obligations of the contract, so far as applicable to a case of default, remained in full force. The United States had a right to get some one else to complete the work and to charge the defendants with the reasonable difference in cost. Indeed this right was expressly stipulated in the specifications, if during the progress of the work a board should recommend that the contract be 'annulled' on the ground that it would not be completed in time. The cost to the United States was the least for which it could get the work done under the conditions upon which the Government was bound to contract, and must be assumed to have been reasonable in the absence of any evidence to the contrary. *New York* v. *Second Avenue R. R. Co.*, 102 N. Y. 572. *Baer* v. *Sleicher*, 153 Fed. Rep. 129. 82 C. C. A. 281. It was less than the sum stipulated as liquidated damages. *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

The objection that the second contractor does not appear to have completed the work intended to be accomplished

by the first, that is to have made a channel of a certain depth, does not impress us. The first contract was for certain work for a certain object, but limited and subject to change as the appropriations might require. The second was for the same on the same plans and specifications, the only difference being in the parties, the price, and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the Government reserved an absolute right of choice in this regard. Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform.

As little need be said in answer to the argument that there was no enforcible contract for want of certainty and mutuality. The power to change details reserved by the United States did not make the contract any the worse, and there were full provisions for ascertaining a change in compensation where any such change was proper. There was nothing warranting an enlargement of the plan beyond the channel of Beaufort River, or the purpose indicated. The contract estimated the amount of material to be removed, and as there were different prices per yard for earth and rock, this amount was expressly made subject to the appropriations, as without expression would have been implied. See Rev. Stat., § 3733. There was some suggestion at the bar that the contract was not signed by the United States. The answer does not deny it, but by implication admits it. The contract says that it is made by the United States by E. O. Matthews, Chief of the Bureau of Yards and Docks, and it is signed by E. O. Matthews, Chief of the Bureau of Yards and Docks, which is enough. The matter does not seem to us to need discussion at greater length.

Judgment of Circuit Court of Appeals reversed.
Judgment of Circuit Court affirmed.